Supreme Court, U.S.
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IN THE
# Supreme Court of the United States

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ROBERT D. STRALEY,
PETITIONER,

v.

UTAH STATE BOARD OF PARDONS,
and CLINT FRIEL, WARDEN,
RESPONDENT.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether The Tenth Circuit Court of Appeals' Holding That Utah's Board Of Pardons Does Not Wield Sentencing Power In Contravention Of That States Separation of Powers Is Erroneous?

2. Whether Utah's Indeterminate Sentencing Scheme Violates Substantive Due Process Because It Creates A Liberty Interest That Is Not Subject To Judicial Review?

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The opinion of the United States Court of Appeals appears at Appendix A to the petition and reported at 582 F.3d 1208.

## JURISDICTION

The Court of Appeals rendered its decision on September 28, 2009. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Utah Code Ann § 77-18-4 (2009)

§ 77-18-4 - Sentence – Term – Construction

(1) Whenever a person is convicted of a crime and the judgement provides for a commitment to the state prison, the court shall not fix a definite term of imprisonment unless otherwise provided by law.

(2) The sentence and judgement of imprisonment shall be for an indeterminate term of not less than the minimum and not to exceed the maximum term provided by law for the particular crime.

(3) Except as otherwise expressly provided by law, every sentence, regardless of its form or terms, which purports to be for a shorter or different period of

time, shall be construed to be a sentence for the term between the minimum and maximum periods of time provided by law and shall continue until the maximum period has been reached unless sooner terminated or commuted by authority of the Board of Pardons and Parole.

## STATEMENT OF THE CASE

In 2005, Robert D. Straley filed a petition in Utah state court challenging Utah's indeterminate sentencing statutes, arguing the Utah Board of Pardon's authority to decide when a prisoner is to be released violated his federal due process and equal protection rights, Utah separation of powers principles, and his right to a speedy trial. The State court denied relief and subsequent appeals for certification were denied.

In 2007, Straley filed a pro se 28 U.S.C.S. § 2241 petition, challenging the constitutionality of Utah's indeterminate sentencing scheme. In his petition, Straley claimed that Utah's indeterminate sentencing framework, where a parole board determined the actual time an offender served in prison violated his federal Due Process and Equal Protection rights, as well as violated the separation of powers doctrine. The United States District Court for the District of Utah dismissed the petition. The court granted a certificate of appealability.

Straley appealed this decision to the Court of Appeals for the 10th Circuit. In its decision, filed

September 28, 2009, the Court upheld the District Court's decision. It found that a federal liberty interest in parole arose only when a prisoner had a legitimate claim of entitlement to it and since the Board of Pardons are granted complete discretion in making parole decisions, there is no state entitlement to parole. Therefore, Utah parole statutes did not create a liberty interest entitling Straley to federal due process protections. Likewise, the Court of Appeals rejected Straley's equal protection argument because Straley failed to identify any similarly-situated individual that had been given any different or more beneficiary treatment. Last, the Court of Appeals rejected Straley's argument that the Board of Pardons violates the separation of powers doctrine because the United States Constitution's separation of powers were inapplicable to a state's organization of its own government. Petitioner Straley now requests that this honorable court grant certiorari to consider his constitutional arguments.

## REASONS FOR GRANTING THE WRIT

### I. The Tenth Circuit Court of Appeals Holding That Utah's Board Of Pardons Does Not Wield Sentencing Power In Contravention Of That States Separation of Powers Is Erroneous.

This Court has enumerated the importance of the separation of powers as a check against governmental tyranny. "[T]he separation of governmental powers into three coordinate Branches

is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380 (1989). Separation of powers was a safeguard the framers built into the Constitution to guard against the "encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). Separation of powers serves the dual function of making the Government accountable and securing individual liberties. Boumediene v. Bush, 128 S.Ct. 2229, 2246 (2008). The Constitution established a system of government presupposes autonomy, separateness, interdependence, and reciprocity. Mistretta, 488 U.S. at 381, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

While it is true that States are free to define their own systems of parole and release, States cannot transform a Board of Pardons, an executive agency, into a judicial body

A. Utah's Indeterminate Sentencing Scheme is an Unconstitutional Delegation of the Judicial Power to the Executive Branch by Utah's Legislative Branch

Utah Code Ann. § 77-18-4 (2009) transfers sentencing power to Utah's Parole board. It reads:

§ 77-18-4 - Sentence – Term – Construction

(1) Whenever a person is convicted of a crime and the judgement provides for a commitment to the state

prison, the court shall not fix a definite term of imprisonment unless otherwise provided by law.

(2) The sentence and judgement of imprisonment shall be for an indeterminate term of not less than the minimum and not to exceed the maximum term provided by law for the particular crime.

(3) Except as otherwise expressly provided by law, every sentence, regardless of its form or terms, which purports to be for a shorter or different period of time, shall be construed to be a sentence for the term between the minimum and maximum periods of time provided by law and shall continue until the maximum period has been reached unless sooner terminated or commuted by authority of the Board of Pardons and Parole.

Id. Note that the statute does not say 'parole authority.' A plain reading of the statue, by its title, is sentencing authority. It is this statute that Petitioner challenges. A statue by its own title and definition states the Board is performing a sentencing function.

The bulk of Utah's jurisprudence defines the Board's power as sentencing as well. In Labrum v. Utah State Board of Pardons, 870 P.2d 902 (1993) the Supreme Court of Utah succinctly stated why, in reality, the function of Utah's Board is normally a sentencing one. They noted "In the past, we have generally relied on the traditional theoretical constructs: grace, contract, and continued custody.

These constructs have continued viability for understanding and regulating some parts of the parole process, and we emphasize that this opinion deals only with original parole grant hearings, not with parole revocation or disciplinary proceedings. The reality of original release hearings is that they are analogous to sentencing hearing and require due process to the extent that the analogy holds." Id. at 908. In Monson v. Carver, 928 P.2d 1017 (1996), discussing the Boards power to order restitution, that court stated "[t]hat the legislature later conferred the procedural authority on the Board to order restitution as a condition of parole as part of the Board's inherent sentencing function . . . does not diminish the fact that the possibility existed at the time of Monson's crime that he would be ordered to pay restitution." Id. at. 1026. Foote v. Bd. Of Pardons, 808 P.2d 734 (Utah 1991) said the Board's function most succinctly: "If the trial judge sends the defendant to prison, the judge does not determine the number of years the defendant will spend there. That is left to the unfettered discretion of the board of pardons, which performs a function analogous to that of the trial judge in jurisdictions that have a determinate sentencing scheme." Id at. 735.

It must be noted that the Utah Supreme Court has subsequently stated that it does not "recognize or acknowledge that the Board has the constitutional power to sentence a convicted criminal." Padilla v. Utah Board of Pardons and Parole, 947 P.2d 664, 668 (Utah 1997). But this holding is a legal fiction only. The holding in Padilla did not circumscribe or limit

the Board's power. Nor did it expressly overrule prior holdings of the board's 'analogous' power. Nor did it interpret the plain reading of Utah Code Ann. § 77-18-4 (2009).

The power to sentence a criminal defendant belongs solely to the judicial branch. Utah Code Ann. § 77-18-4 prohibits the judicial branch from properly sentencing a criminal defendant. It is an impermissible delegation of the judicial powers protected by the Utah State Constitution.

## II. Utah's Indeterminate Sentencing Scheme Violates Substantive Due Process Because it Creates a Liberty Interest That Is Not Subject to Judicial Review

A Federal liberty interest "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation of or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Every defendant that is granted a original release hearing is granted a liberty interest protected by due process.

Again, the Labrum court's words ring true: "[t]he reality of original release hearings is that they are analogous to sentencing hearing and require due process to the extent that the analogy holds." Labrum v. Utah State Board of Pardons, 870 P.2d 902, 908 (1993). Indeed, "[f]or all intent and purposes, adoption of this indeterminate sentencing system

transformed the Board from an agency having the ability to shorten a prisoner's judge-determined sentence into an agency with power analogous to that of a court to actually impose a sentence. Therefore, the Board's decision of whether to grant parole does implicate the offender's liberty interest because at the time an offender first comes before the Board, no term of incarceration has been fixed. Consequently, at least under some circumstances, the Board's decision-making process must be restricted by the procedural safeguards of due process." Neel v. Holden, 886 P.2d 1097, 1101 (1994). Utah has created a liberty interest for all Defendant's sentenced since the term of incarceration is not legally fixed until there initial appearance in front of the Board. Utah's indeterminate sentencing scheme provides no judicial safeguards since it gives the Parole Board unfettered discretion.

The Utah Court in Thomas v. State, 63 P.3d 672 (2002) declined to rule on the denial of credit of time served stating:

> "Finally, we may not review the Board of Pardons and Parole's refusal to grant Thomas credit for time served as such decision are within the discretion of the Board. Under Utah Code Ann.§ 77-27-5(3) (1995). 'decisions of the board in cases involving paroles, pardons, commutations or termination of sentence, restitution or remission of fines or forfeitures are final and are not subject to judicial review.' This court noted in Petersen

> v. Board of Pardons, 907 P.2d 1148, 1151 (Utah 1995), that 'the Legislature has specifically barred appeals from Board of Pardons orders."

Id. The fact pattern in Thomas was analogous to this Courts review of Wolff v. Mcdonnell, 418 U.S. 539 (U.S. 1974). Utah Code Ann. § 77-18-4 (2009) unconstitutionally grants the Parole Board discretion over a liberty interest that is without judicial review. As such, it is unconstitutional.

## CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Tenth Circuit Court of Appeals.

Dated: December 23, 2009

Respectfully submitted,

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# APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 08-4170

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ROBERT D. STRALEY,
PETITIONER

v.

UTAH STATE BOARD OF PARDONS, et. al.,

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Submitted on the Briefs
Filed September 28, 2009

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OPINION

TYMKOVICH, Circuit Judge.

Robert D. Straley, a Utah state prisoner, brings this pro se 28 U.S.C. § 2241 petition challenging the constitutionality of Utah's

indeterminate sentencing scheme.[1] He claims Utah's statutory sentencing framework, whereby a parole board determines the actual time an offender serves in prison, violates his federal due process and equal protection rights. The district court dismissed Straley's petition, finding he had failed to raise a cognizable claim for relief. We granted a certificate of appealability.

For substantially the same reasons as the district court outlined in its opinion, we DENY Straley's habeas petition.

I. Background

In August 1993, Straley was sentenced to two one-to-fifteen-year sentences, to be served concurrently, after he pleaded guilty to two counts of sexual abuse of a child. Straley's prison sentence, however, was stayed and he was placed on probation.

After violating the terms of his probation in 1996, Straley was sent to prison. Subsequently, on four separate occasions between January 2002 and

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[1] Straley filed a pro se motion for a certificate of appealability (COA) and opening brief. We construe these pro se filings liberally. See Van Deelen v. Johnson, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007). After we granted COA on two issues, Straley obtained an attorney, who was on Straley's reply brief.

August 2006, Straley was released from prison on parole. Without fail, though, Straley would violate the terms of his parole and return to prison. He is currently serving the remainder of his fifteen-year sentence in a Utah prison after his most recent parole revocation.

In 2005, Straley filed a petition in Utah state court challenging Utah's indeterminate sentencing statutes. He argued the Utah Board of Pardon's (Board) authority to set a release date within Utah's indeterminate sentencing scheme violated his federal due process and equal protection rights, Utah separation of powers principles, as well as his right to a speedy trial. The state court denied relief.

Subsequently, in August 2007, Straley filed this § 2241 habeas petition in Utah federal court, raising the same arguments challenging the manner and execution of his sentence under Utah's statutory sentencing framework. The district court dismissed the petition after finding "there is no federal constitutional or inherent right of a convicted person to be released before the expiration of a valid sentence--in this case, a span extending to fifteen years in prison." R., Doc. 56 at 2-3. First, the court determined "the Utah parole statute [does not] create a liberty interest entitling prisoners to federal constitutional protection." Id. at 3. Second, as to Straley's challenge to Utah's indeterminate sentencing scheme, the court held the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004),

"specified that indeterminate sentencing schemes are constitutional." R., Doc. 56 at 3. Finally, the court concluded:

> [T]he history of [Straley's] sentences belies all his arguments. His sentences were initially stayed and he was put on probation. He apparently would have served no time at all had he observed the terms of his probation. This would obviously have been far, far less than the time recommended by "the [Utah] guidelines." After he served about six years of his sentence, he was again given the chance to serve about nine years less than the fifteen years he originally faced. He then chose--four times--to violate his parole terms and extend his prison stay past six years. It was solely his choice to spend longer than five years imprisoned. It is thus disingenuous for [Straley] to accuse [the Board] of lengthening his prison stay by violating the Constitution.

Id.

Straley then brought this appeal. In addition to the arguments he raised before the district court, Straley also contends the district court erred by failing to exclude certain evidence before dismissing the case for failure to state a claim for relief. Because Straley's petition to this court made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we granted a certificate of appealability (COA) on only two issues:

(1) Whether Utah's indeterminate sentencing statute, Utah Code Ann. § 77-18-4, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution; and

(2) Whether the Utah Board of Pardon's role and discretion under Utah's statutory sentencing scheme is unconstitutional.

II. Analysis

Straley argues Utah Code Ann. § 77-18-4[2] is unconstitutional for two main reasons. First, he claims the statute violates his due process liberty

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[2] Section 77-18-4 provides:

(1) Whenever a person is convicted of a crime and the judgment provides for a commitment to the state prison, the court shall not fix a definite term of imprisonment unless otherwise provided by law.

(2) The sentence and judgment of imprisonment shall be for an indeterminate term of not less than the minimum and not to exceed the maximum term provided by law for the particular crime.

(3) Except as otherwise expressly provided by law, every sentence, regardless of its form or terms, which purports to be for a shorter or different period of time, shall be construed to be a sentence for the term between the minimum and maximum periods of time provided by law and shall continue until the maximum period has been reached unless sooner terminated or commuted by authority of the Board of Pardons and Parole.

interests in parole because Utah's indeterminate sentencing scheme fails to ensure a proper check on the Board's discretion in making parole decisions.

Second, he contends his equal protection rights have been violated because similarly-situated offenders have served far less time in prison than he has and the Board's decisions are allegedly rife with religious and racial preferences. Within each of these broader contentions, Straley argues Utah's sentencing framework unconstitutionally imparts the Board with judicial and legislative functions.

Straley makes a third, subsidiary argument that the Board violates federal separation of powers principles.

The district court dismissed Straley's § 2241 motion, finding he had failed to raise any federal constitutional ground for relief. See § 2241(c). "The writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States."). Addressing these claims on appeal, we review the legal issues de novo. United States v. Eccleston, 521 F.3d 1249, 1253 (10th Cir. 2008). For the reasons discussed below, we agree with the district court and find that Straley fails to raise any federal grounds for relief.

A. Due Process

Straley's first argument is that Utah's

indeterminate sentencing scheme implicates his federal due process rights. He focuses on the fact that, in Utah, state sentencing judges have no discretion to impose a particular, individualized sentence and are instead required to sentence a criminal to an indefinite range of years. Relying on the Utah Supreme Court's decision in Foote v. Utah Board of Pardons, 808 P.2d 734, 734-35 (Utah 1991), Straley argues Utah's sentencing process is "legally different [from] traditional parole proceedings." Aplt. Br. at 10. In particular, he claims that because Utah has recognized a state constitutional liberty interest in parole, "the same conclusion must stand under the federal constitution." Id. at 11; see also Neel v. Holden, 886 P.2d 1097, 1101 (Utah 1994) (finding a state constitutional due process interest in both an original parole grant hearing as well as in a new parole hearing proceeding a parole revocation). According to Straley's logic, because such a federal due process interest therefore exists, it must necessarily be violated by (1) the indeterminacy of his sentence, and (2) the Board's discretion to determine his eligibility for parole. These arguments are without merit.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174

(2005) (citations omitted). The extent of the due process protection for prisoners, however, is significantly less than that guaranteed to free persons. Estate of DiMarco v. Wyo. Dep't of Corr., Div. of Prisons, 473 F.3d 1334, 1339 (10th Cir. 2007) (citing Wolff v. McDonnell, 418 U.S. 539, 555-57, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). A state's parole statute may create a liberty interest only when the statute's language and application sufficiently limits the discretion of a parole board. See Bd. of Pardons v. Allen, 482 U.S. 369, 381, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (determining a Montana parole statute's use of mandatory language created a liberty interest in the expectancy of parole); Jago v. Van Curen, 454 U.S. 14, 20-21, 102 S. Ct. 31, 70 L. Ed. 2d 13 (1981) (finding Ohio statute did not create a liberty interest in the expectancy of parole because parole decision was discretionary).

We have previously upheld Utah's sentencing scheme against constitutional challenge. By way of background:

> Utah has a sentencing system in which the trial judge is required to impose the statutorily prescribed range of years and then the Board of Pardons decides the length of time a person is confined. The board relies on [the state] sentencing guidelines to estimate the proper length of sentence under the circumstances and to establish an original parole release date, much like a sentencing judge in the federal system. The Utah Constitution grants

> due process protection for the original parole grant hearing at which the board determines the predicted terms of incarceration.

Malek v. Haun, 26 F.3d 1013, 1016 (10th Cir. 1994) (internal citations omitted). But in considering this procedure in Malek, we held that while a prisoner's challenge to the Board's parole determination may allege "a violation of the Utah Constitution, a violation of state law alone does not give rise to a federal cause of action." Id.

Rather, relying on the Supreme Court decision in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1978), we found a federal liberty interest in parole only arises when a prisoner has a legitimate claim of entitlement to it. Malek, 26 F.3d at 1015 ("Not only is there no constitutional or inherent right to receive parole prior to the expiration of a valid sentence, but, absent state standards for the granting of parole, decisions of a parole board do not automatically invoke due process protections."). Noting Utah's permissive, rather than mandatory, language with respect to a state prisoner's eligibility for parole, we concluded:

> Following the principles established in Greenholtz,[the Utah] statutes create no "legitimate expectation of release." The Utah statute grants the parole board complete discretion in making parole decisions, once an offender is eligible. . . . [W]e hold that the Utah parole statute does not create a liberty

> interest entitling [a state prisoner] to due process protection under the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 1015-16 (internal citations and quotations omitted).

Straley challenges Malek's precedential value in light of a more recent Supreme Court case, Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). We disagree.

As an initial matter, we can dispose of Straley's contention that Utah's "indeterminate" sentencing scheme is unconstitutional. It is not. First, while Utah's sentencing is indeterminate, it operates with constraints. True, once a defendant is convicted, he is sentenced by the state trial court to "an indeterminate sentence as provided by statute." Padilla v. Utah Bd. of Pardons & Parole, 947 P.2d 664, 669 (Utah 1994). But this "'indeterminate' sentence shall continue until the maximum period expires unless the Board, in its discretion, terminates or commutes the punishment or pardons the offender." Id. (emphasis added). So, in reality, the trial court is sentencing the offender to a definite term--the maximum under the relevant state statute. Id.; see Blakely, 542 U.S. at 303 (noting the constitutionality of determinate sentencing where a judge imposes a statutory sentence solely on the basis of the facts reflected by the jury verdict or admitted by the defendant). Straley does not argue--nor could

he here--that his original sentence was imposed without due process. Straley's § 2241 habeas petition can only challenge the execution of his sentence, not the validity of his conviction and the original sentence.

Second, there is no constitutional right to an individualized sentence. E.g, United States v. Horn, 946 F.2d 738, 746 (10th Cir. 1991) ("We have rejected the notion that a defendant has a due process right to a discretionary, individualized sentence in a noncapital case."). Nothing in Straley's arguments convinces us that any due process interest is violated by Utah's judicially imposed, statutorily-mandated sentence.

We now turn to Straley's contention that our holding in Malek is constitutionally suspect after Sandin v. Conner. In Sandin, the Supreme Court abandoned its Greenholtz approach to determining whether state regulations or statutes created a due process interest. While Greenholtz had parsed the text of the relevant state law to determine whether a liberty interest had been created, Sandin announced that "the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." Sandin, 515 U.S. at 483. Instead, the Court held:

> The time has come to return to the due process principles we believe were correctly established and applied in Wolff. . . . Following

> Wolff, we recognize that . States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 483-84 (internal citations omitted); see also Estate of DiMarco, 473 F.3d at 1339.

Although we relied on Greenholtz's textual approach in Malek, nothing in Sandin undermines our ultimate conclusion: a federal liberty interest in parole only arises when a prisoner has a legitimate claim of entitlement to it. Under Sandin, a state creates a liberty interest in avoiding certain prison conditions only where those conditions are an atypical and significant hardship in relation to the ordinary incidents of prison life. Notably, Sandin was decided only in the context of prison conditions, not parole eligibility.

In the context of parole eligibility, three key conclusions undermine Straley's due process arguments. First, in a case subsequent to Sandin, the Supreme Court itself relied on Greenholtz to reaffirm there is no constitutional entitlement to release on parole independent of a right explicitly conferred by

the State. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998). An individual's interest in release or commutation "is indistinguishable from the initial resistance to being confined," and that interest has already been extinguished by the conviction and sentence. Id. (citation and quotation omitted); see Wildermuth v. Furlong, 147 F.3d 1234, 1237 (10th Cir. 1998) (same). And most importantly, the Court once again reaffirmed its previous conclusions that a prisoner enjoys no substantive expectation for parole. Sandin, 515 U.S. at 482-83 (referring to parole proceedings in the context of clemency and pardon). Thus, the mere existence of a purely discretionary parole authority creates no entitlement and, therefore, no concomitant federal due process interest. Id. at 284.

Second, we have never held that a prisoner's eligibility for a discretionary parole is an "atypical and significant hardship." Straley's eligibility for parole in no way affects the manner in which he is confined, hence no liberty interest under Sandin is implicated.

Finally, even assuming Straley has some federal due process interest in receiving parole, nothing in his petition demonstrates any possible violation. Instead, quite the opposite is true. Straley has apparently been paroled four times. Each time he has chosen to violate the terms of his parole. The Board has the discretion, once Straley is eligible, to grant parole once again. It is simply premature to

presume some due process violation by the Board in exercising its discretion.

In sum, our previous holding in Malek is still patent. See Wildermuth, 147 F.3d at 1234 (applying Malek after the Supreme Court's decision in Sandin); Morello v. Utah Bd. of Pardons, 194 F. App'x 505 (10th Cir. 2006) (applying Malek to find no federal due process liberty interest in parole); Suarez v. Utah Bd. of Pardons & Parole, 76 F. App'x 230 (10th Cir. 2003) (same); see also United States v. Mitchell, 518 F.3d 740, 752 n.14 (10th Cir. 2008) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."). The Utah parole statutes grant the Board complete discretion in making parole decisions; Straley has no state entitlement to parole. And, Straley has no federal right to release on parole before serving his fifteen-year sentence. The Utah parole statutes, therefore, do not create a liberty interest entitling Straley to federal due process protections.

Therefore, Straley's petition fails to raise any due process cause of action.

B. Equal Protection

Straley also argues his equal protection rights have been violated by Utah's sentencing framework. Specifically, Straley compares himself to another Utah sex offender who allegedly received a shorter sentence. He makes a conclusory assertion that there

are racial disparities in the Board's parole determinations. He also claims the Board shows favoritism towards Mormon sex-offenders. Straley's arguments are unpersuasive.

The Fourteenth Amendment guarantee of equal protection "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Straley fails to provide any real evidence he was treated differently. If anything, he was originally given an even shorter sentence than the "similarly situated" individuals Straley claims were given more lenient treatment by the Board. Straley, in fact, was originally given probation. He would not have served a prison sentence but for his probation violation in 1996. Furthermore, Straley was paroled four times after serving six years of his fifteen-year sentence. Once again, he is back in prison because of his conduct, not because of any parole determination by the Board.

Straley fails to identify any similarly-situated individual that has been given any different or more beneficial treatment. His bare equal protection claims are simply too conclusory to permit a proper legal analysis. See Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995) (stating that complaint's allegations were "too conclusory" to allow for complete equal protection analysis). We therefore find Straley has failed to raise any plausible equal

protection claims.

C. Separation of Powers

Finally, Straley contends the Board improperly operates as "a 'fourth branch of Government.'" Aplt. Br. at 33. These arguments, too, fail to raise any cognizable federal claim for relief.

To the extent Straley challenges the Board's function and discretion under Utah's sentencing scheme as a violation of federal due process and equal protection, we have rejected those claims above.

And, to the extent he contends this violates some federal separation of powers principles, his argument is misplaced. The United States Constitution's separation of powers principles are inapplicable to a state's organization of its own government. And, Utah courts have rejected identical separation of powers challenges under Utah's constitution. See Padilla, 947 P.2d at 669 ("[W]e hold that the Board's exercise of its parole power in setting determinate parole dates does not violate the separation of powers doctrine of article V, section 1 of the Utah Constitution.").

III. Conclusion

For the foregoing reasons, we DENY Straley's § 2241 petition for habeas relief. We DENY COA on all other issues. We also DENY Straley's motion to disqualify Utah judges on the panel. We further

GRANT Straley's motion to proceed in forma pauperis and GRANT his pro se motion to supplement the reply brief.

APPENDIX B

SUPREME COURT OF UTAH

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No. 20061066

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STRALEY,

v.

BOP,

---

January 10, 2007, Decided

153 P.3d 185 (Utah 2007)

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DECISION WITHOUT PUBLISHED OPINION

OPINION

PETITION FOR WRITS OF CERTIORARI DENIED.

APPENDIX C

COURT OF APPEALS UTAH

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No. 20060313-ca

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STRALEY,

v.

UTAH BOARD OF PARDONS,

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August 31, 2006, Filed

2006 UT App 363 (Utah 2006)

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OPINION

MEMORANDUM DECISION
PER CURIAM:

Robert D. Straley appeals the district court's dismissal of his petition for extraordinary relief. We affirm.

We review a district court's decision in a rule 65B(d) extraordinary writ case for abuse of discretion. See State v. Barrett, 2005 UT 88, P26, 127 P.3d 682. "[A] mistake of law 'may constitute an abuse of discretion.'" Id. (citation omitted). Straley alleges that Utah's indeterminate sentencing scheme is unconstitutional. See Utah Code Ann. § 77-18-4 (2003). More particularly, he alleges that it violates principles of due process and equal protection, as well as the Sixth and Eighth Amendments to the federal Constitution.

Utah courts have repeatedly concluded that Utah's indeterminate sentencing scheme does not violate either the federal Constitution or the state Constitution. See Padilla v. Board of Pardons, 947 P.2d 664, 669 (Utah 1997) (rejecting argument that sentencing scheme violates separation of powers clause); Monson v. Carver, 928 P.2d 1017, 1023 (Utah 1996) (rejecting claim that Utah's sentencing scheme violates constitution because it is mentally cruel to prisoners). In his petition, Straley failed to address these and similar cases that conclude that the indeterminate sentencing scheme is constitutional. Further, he failed to adequately advance any new theories concerning the constitutionality of the scheme. Accordingly, the district court did not abuse its discretion in dismissing Straley's petition.

Affirmed.

Russell W. Bench, Presiding Judge
Judith M. Billings, Judge
William A. Thorne Jr., Judge

No. 09-768

Supreme Court, U.S.
FILED
JAN 29 2010
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

ROBERT D. STRALEY,

*Petitioner,*

v.

UTAH STATE BOARD OF PARDONS, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Separation of Powers Provision of the United States Constitution apply to the states?

2. Does Utah's statutory parole scheme, which gives the Utah parole board broad discretion to determine parole within an indefinite sentencing system, create a federally-protected liberty interest?

Respondents Utah Board of Pardons and Warden Clint Friel submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Straley v. Board of Pardons*, 582 F.3d 1208 (10th Cir. 2009).

## REASONS FOR DENYING THE PETITION

### I. There Is No Compelling Reason To Grant This Petition For A Writ Of Certiorari

While claiming that the United States Court of Appeals for the Tenth Circuit erred in its decision, petitioner has not put forth any compelling reason why this Court should grant his petition. Sup. Ct. R. 10. He has neither claimed nor shown that there is a conflict between the challenged decision of the Tenth Circuit and that of any other United States court of appeals. Petitioner has not claimed that an important federal question was decided in a manner that conflicts with the decision of any other United States court of appeals or a state court of last resort. Nor has petitioner shown that the lower court's decision "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Instead, petitioner simply claims that the Tenth Circuit's decision was wrong in two particulars. This petition for a writ of certiorari should be denied

because it fails to raise any question worthy of review by this Court.

## II. The Separation Of Powers Provision Of The United States Constitution Does Not Apply To The States

Petitioner admits that the United States Court of Appeals for the Tenth Circuit rejected his separation of powers argument "because the United States Constitution's separation of powers were inapplicable to a state's organization of its own government." Petition for a Writ of Certiorari at 3. But, in seeking review before this Court, the petitioner fails to address the actual ruling of the lower court. Instead, he repeats his argument that Utah's Board of Pardons is performing a judicial function in setting parole dates. He does not address the actual issue decided, i.e., that the federal separation of powers doctrine does not apply to Utah.

In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 255 (1957), this Court explained that "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." In reaching that conclusion, this Court relied, in part, on its prior decision in *Dreyer v. People of State of Illinois*, 187 U.S. 71 (1902).

> Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to

> one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.

*Id.* at 84.

The United States Constitution guarantees each state a republican form of government. U.S. Const. art. IV, § 4. It does not require of the states that their governments comply with the federal concept of separation of powers. The Utah Supreme Court has held that the powers of the Utah Board of Pardons do not violate the separation of powers provision of Utah's Constitution. *Padilla v. Utah Bd. of Pardons and Parole*, 947 P.2d 664, 668-69 (Utah 1997). This is a question of state law and does not raise an important federal question that should be addressed by this Court.

## III. No Federal Liberty Interest Is Created In Parole Under Utah Law

Petitioner claims that he had a liberty interest in being granted parole. Petition for a Writ of Certiorari at 7. In making this claim he does not cite to any federal precedent establishing such a right, but infers it from the limited right to procedural due process that is found under Utah law. *Padilla*, 947 P.2d at 666.[1] But petitioner has failed to explain how the

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[1] "[T]wo due process requirements must be met in parole grant hearings. First, an inmate must receive adequate notice to

(Continued on following page)

lower court erred in finding that no federal liberty interest had been created.

Utah's parole board is given very broad discretion in making parole decisions. But a federal liberty interest is only created when state law sufficiently limits the discretion of a parole board. *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987). Where such a board has broad discretion in making its decisions, no federal liberty interest is created. *Jago v. Van Curen*, 454 U.S. 14, 20-21 (1981).

Nor does a state-created right to procedural due process create a federal liberty interest. In *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983), this Court held that a state's requirement that certain procedures be followed in making a discretionary decision did not create a liberty interest where no substantial restrictions are placed on the discretion to be exercised. No federal liberty interest has been created by Utah's parole system.

Petitioner also errs in claiming that Utah courts will not enforce the state constitutional right to limited procedural due process in parole hearings. In *Preece v. House*, 886 P.2d 508, 512 (Utah 1994), the Utah Supreme Court expressly ordered that a new

---

prepare for a parole hearing Second, an inmate must receive copies or a summary of the information in the Board's file upon which the Board will rely in deciding whether to grant parole" *Peterson v Utah Bd of Pardons*, 931 P2d 147, 150 (Utah App 1997) (citations omitted)

parole hearing be granted because an inmate's state procedural right had been violated. Further, the Utah Supreme Court reviews other claims of error on the part of the parole board under an arbitrary and capricious standard, where a showing of sufficiently unusual circumstances would constitute grounds for overturning the board's decisions. *Padilla*, 947 P.2d at 671.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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In the Supreme court of the united States

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no 09-768

Robert D. Straley

Petitioner

Against

Utah Board of pardons and
Clint Friel, warden

Respondents

Supreme Court, U.S.
FILED
MAR 23 2010
OFFICE OF THE CLERK

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Petition for Rehearing on petition for writ
of certiorari to the Tenth circuit court
of Appeals

---

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Gunnison Ut. 84634-0550

## Question presented

1. In 1981 members of this court questioned Greenholtz' mandatory language approach to determine when a state statute creates a liberty interest. Again in 1987 members of this court questioned Greenholtz' approach. In 1991 the Seventh circuit rejected Greenholtz' approach and created their own test. Finally in 1995 this court abandoned Greenholtz' approach. In Sandin v. conner this court said, the search for a negative implication from mandatory language has strayed from the real concerns undergirding the liberty protected by the Due process Clause. In 2009, in the case at hand, the Tenth circuit recognized; "[i]n Sandin, the supreme court abandoned Greenholtz' approach....." However, there is confusion among the circuits, including the D.C. circuit, as to the proper approach and subsequently the circuits have continued with Greenholtz.

**what is the proper test to determine when a state statute creates a Federally-protected liberty interest?** Is the Seventh circuits test the proper approach? Is wolff v. mcdonnell the proper approach?

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## Opinion Below

The opinion of the United States court of Appeals appears at Appendix A to the petition for certiorari and reported at 582 F.3d. 1208.

## Jurisdiction

The court denied the petition for certiorari on march 8, 2010. This petition for rehearing is filed within 25 days of that date as provided by rule 44.2. Jurisdiction is proper under 28 U.S.C. § 1254(1).

## Reasons for granting the Rehearing

In accordance with Rule 44.2 of the Supreme court rules. This petition contains substantial grounds not previously presented. The court abandoned Greenholtz' mandatory language approach to determine when a State Statute creates a liberty interest. The courts decision however, has created conflict and thus guidance on the issue is of great importance. The court should correct the misinterpretation among the lower courts and make clear what the proper test is. Futhermore, the issue is of wide concern, is likely to recur and the Attorney General for the State of Utah is misrepresenting a Utah case.

I. This court abandoned Greenholtz' mandatory language approach to determine when a State Statute creates a liberty interest.

We begin with Greenholtz. Greenholtz answered two important questions; First, whether the Due process Clause itself created a liberty interest in parole. Second, whether a liberty interest in parole was a statutory creation of the State. Greenholtz v. Inmates of Neb. 442 U.S. 1 (1979). The court held that there is no constitutional or inherent right to parole prior to the expiration of a valid Sentence. Id at 7. The court did however, decide that the State Statute had created a protected liberty interest. Id at 7-11. As Sandin v. conner would later point out, "the court appearently accepted the inmates argument that the word 'shall' in the statute created a legitimate expectation of release." Nevertheless, the State ultimately prevailed because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment.

within a decade Greenholtz' mandatory language approach was called into question. In Board of pardons v. Allen the court Stated;

> "There is far more to liberty than interest conferred by language in State statutes..... Four members of this court are of the view that the existence of a liberty interest in parole release is not solely a function of the wording of the governing statute..... I do not believe however, that the application of the Due process Clause to parole-release determination depends upon the wording of the Statute..."

Board of pardons v. Allen 482 U.S. 369, 373 N.3 (1987). However, "the parties ..... [did] not urge[] abandonment of Greenholtz ....." and thus the court continued with the mandatory language approach. Id at 376N6. Four years later the Seventh circuit rejected the approach stating;

> "we are skeptical about placing too much weight on grammatical distinctions ....." The court added. "[no] magic form of words is required to make a regulation mandatory as long as it sets out criteria that are binding, exhustive and definite."

Smith v. Shette 946 F.2d 1250, 1252-53 (7th cir 1991). In 1994 the Tenth circuit followed Greenholtz' approach and determined that the wording "..... may be released upon parole," contained in Utah's parole statute, Utah code Ann § 77-27-5 and 9," ..... created no 'legitamate expectation of release ....." malek v. Haun 26 F.3d. 1013, 1015-16 (10th cir 1994). A year after malek however, this court decided Sandin v. conner 515 U.S. 472 (1995). Sandin, as the Tenth circuit correctly points out in Straley "..... abandoned Greenholtz approach to determine whether **State regulations** or **Statutes** created a due process interest." Straley v. Utah Bd. of pardon 582 F.3d. 1208 ____ (10th cir 2009). while it is true "Sandin was decided only in the context of prison conditions." Id. Sandin, as argued below, expressly denounced Greenholtz **in both** prison policy situations and State Statute Situations.

Sandin's Due process analysis begins with wolff v. mcdonnell (a State Statute case) and meachum v. Fano (a prison policy case). The court explains how wolff and meachum are constitutionally correct. Sandin than explains how the liberty interest approach strayed off course, citing Greenholtz v. Inmates of Neb. (a State Statute case) and Hewitt v. Helms (a prison policy case) the court explained;

> "Shortly after meachum the court embarked on a different approach to defining State created liberty interest..... Greenholtz inmates alleged that they had been unconstitutionally denied parole ..... the court apparently accepted the inmates argument that the word 'shall' in the Statute created a legitimate expectation of release... .. Instead of looking to whether the State created an interest of 'real substance' comparable to the good time credit Scheme of wolff, the court asked whether the State had gone beyond issuing mere procedural guidelines and had used 'language of a unmistakably mandatory character' such that the incursion on liberty would not occur absent specified substantive predicates ....., **shifting the focus of the liberty inquiry to one based on the language of a particular regulation and not the nature of the deprivation** ..... The Search for a negative implication from mandatory language ..... has Strayed from the real concerns undergirding the liberty protected by the Due process Clause. The time has come to return to the principles correctly established in wolff and meachum. Following wolff, we recognize that States may under certain circumstances create liberty interests which are protected by the Due process Clause."

Sandin 515 U.S. at 476-85. Sandin goes on to explain what the Standard is when dealing with prison policy Situations.

i.e. atypical and significant hardship in relation to the ordinary incidents of prison life. However, its unclear from Sandin what the approach is when the question involves a state statute. Sandin returned to the principles that were correctly established in Wolff, (a state Statute case). Is Wolff the proper Standard? Wolff looked to the nature of the deprivation and characterized the liberty interest as one of "real substance", Wolff v. Mcdonnell 418 U.S. 539, 557 (1973). The circuits however, are confussed as to the proper Standard. The D.C. circuit wrestled with the question of whether Sandin overruled Greenholtz, but ultimately applied Greenholtz protege, the court said;

> "In this situation, we think the only course open to us is to comply with the rule expressed in Rodriguez de Quijas: If a precedent of this court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of Appeals should follow the case which directly controls, leaving to this court the prerogative of overruling its own decisions."

Ellis v. District of Columbia 84 F.3d 1413, 1417-18 (D.C. cir 1996), Compair, McQuillion v. Duncan 306 F. 3d. 895, 901-03 (9th cir 2002) (following Greenholtz, california Statute created a liberty interest), Closs v. Weber 238 F.3d. 1018, 1022 (8th cir 2001) (following Greenholtz state Statute gives parole board complete discretion, no protected liberty interest). Again the tenth circuit recognized "..... [t]he Supreme court abandoned its

Greenholtz' approach to determining whether a State ..... Statute created a liberty interes.. Straley 582 F.3d. at __ However, that conclusion, the Tenth circuit reasoned, was undermined by the fact that "...[I]n a case subsequent to sandin the supreme court relied on Greenholtz to reaffirm there is no constitutional entitlement to release ..... most importantly, the court once again reaffirmed its previous conclusion that a prisoner enjoys no substantive expectation for parole," Id. citing Ohio Adult parole Authority v. woodard 523 U.S. 272 (1998).

while it is true this court in Ohio Adult parole Authority relied on its prior decision in Greenholtz and held there was no constitutional right to "clemency," and the State of Ohio had not "created a substantive expectation of 'clemency'", Id. at 282-83. Ohio Adult parole Authority is distinguishable. First, it appears to be the same situation as Board of pardons v. Allen, i.e. **nobody urged abandonment of Greenholtz.** next, recognizing the abandonment of Greenholtz and adopting wolff's analysis is not going to change Ohio Adult parole Authority, there, the court specifically said;

> "under any analysis, the Governor's executive discretion [in clemency] need not be fettered..."

Id at 282. Finally, clemency is different from indeterminate sentencing.

II. Utah's indeterminate Sentencing System is a Federally-protected liberty interest and Utah's Attorney General is misrepresenting a Utah case.

The Utah Supreme court recognizes Utah's indeterminate Sentencing System as a "..... distinct species intelligibilis." McCoy V. Severson 222 P.2d 1058, 1064 (Utah 1950). Utah's System is distinct from anything this court has ever heard before and regardless of whether the Utah Bd. of pardons is performing a legislative function, has the power to Sentence or the power to parole. There decisions are, arguably, decisions of real substance. The Tenth circuit equated there decisions with that of "..... a Sentencing Judge in the Federal System." Malek 26 F. 3d. at 1016. The only difference between a Sentencing Judge in the Federal Sentencing System establishing a determinate Sentence from a indeterminate range and the Utah Bd. of pardons establishing a determinate Sentence from an indeterminate range **is the time of the determination.** (emphasis added). why require Sentencing Judges in the Federal System and State Systems to adhere to the Federal constitution and not require the Utah Bd. of pardon to adhere to the same? Regardless of whether these hearings are Sentencing hearings or administrative Sentencing hearings they require the equivalent Federal Due process protections. (emphasis added again).

The Tenth circuit and the District court made there decision in part on the fact that "between January 2002 and August 2006 petitioner was released on parole and on four separate occasions violated his parole". First, the parole information was submitted outside the pleadings and petitioner properly objected in the District court and raised the issue in the Appellate court. The Tenth circuit acknowleged that petitioner raised the issue but the court failed to address the question in the opinion, the court said;

> "In addition to the arguments he raised before the district court, Straley also contends the district court erred by failing to exclude certain evidence before dismissing the case for failure to state a claim for relief."

Straley 582 F.3d. at ___. Rule 12(b) provides that if matter outside the complaint are presented to and not excluded by the court, then the court should treat the motion as one for Summary judgment. The District court of Utah failed to exclude the information and failed to convert to Summary judgment which is reversible error. Ohio v. peterson et. al 584 F.2d 454, 457 (10th cir. 1978), Torres v. First State Bank of Sierra County 550 F.2d 1255, 1257 (10th cir 1977).

Next, parole does not change the sentence. This court has repeatedly recognized that the prisoner while on parole remains in legal custody.

In Warden Lewisburg penitentiary v. marrero 417 U.S. 666, 667 (1974). this court said;

> "..... the prisoner while on parole remains in legal custody and under the control of the parole board..... The Sentence to be served is still [in petitioner: case 15 years] whether or not he is granted parole....."

citing Anderson v. corall 263 U.S. 193 (1923). See also Jones v. cunningham 371 U.S. 236, 243 (1962). The Utah Supreme court recognized the principle as well, the court has said;

> "The granting of parole does not change the status of a prisoner; he is legally in custody..... until the parolee's sentence is terminated."

Reeves v. Turner 501 P.2d 1212, 1214 (Utah 1972). Finally, Utah's parole and parole revocation process can not be seen as legitimate. the Utah Supreme court has consistantly refussed to review the parole boards decisions, in Linden v. Dept. of corrections the court said;

> "Here, Linden asks us to conduct a substantive review of the Boards decision to revoke his parole. we find no clear Utah authority, that would indicate that Linden has a right to a substantive judicial review of the Board's decisions....."

Linden v. State. Dept. of corrections 81 P. 3d. 802, 805 (Utah App. 2003). the Utah Supreme court has said that, in spite of Utah code Ann § 77-27-5(3) non-review dictate, Utah courts will review the Boards

decisions in "unusual circumstances". However, when presented with "unusual circumstances," i.e. the boards refusal to grant credit for time served, which as this court knows is constitutionally mandated, the Utah Supreme court refused to review that decision. Thomas v. State 63 p.3d. 672, 674 (Utah 2002). The reality is the court has not and will not review the board's decisions.

In the States brief in opposition to petition for certiorari the Attorney General for the State of Utah states; "the Utah Supreme court expressly ordered that a new parole hearing be granted because an inmate's State procedural rights had been violated." Brief in opposition at 4-5. However, thats not the issue at hand. "[T]he touchstone of Due process is protection of the individual against arbitrary action of the Government." Wolff 418 U.S. at 558. In Preece v. House the case cited by the Attorney General, inmate Robert preece, in may of 1992 filed a complaint alleging that, inter alia, the board had inappropriately exceeded his sentencing guidelines by 36 months. In the Summer of 1992 the Attorney General for the State of Utah discovered that a typing error had occured, "the board staff had in fact miscalculated the guidelines by 36 month," on the bases of that information "the court continued the case to let the board of pardons decide what

they want to do in terms of taking the own action first." Preece v. House 886 P.2d. 508, 511 (Utah 1994). In September of 1992 the board conducted a hearing and refused to change there decision and refused to give a reason why preece should spend the longer term. In responce, the district court granted the writ and ordered preece to be released forthwith, the court said;

> "[U]der the circumstances of the error made as to the guidelines discussed with petitioner ..... the petitioner is entitled to an explanation of the error which the board refuses to do. Further, Our process requires fair process and petitioner is entitled to an explanation of why the error should be ignored and the longer term served....."

Id. at 510. subsequently both the Utah court of Appeal on Appeal and the Utah Supreme court on certiorari held that the determinations by the board are "inherently a sentencing function" but, under the **star chamber philosophy**, ultimately held the "Decisions of the board of pardons are final and not subject to judicial review." Id at 512.*

---

* petitioner is faced with a similar situation. petitioners guideline called for 60 months (5 years) the board of pardons has given petitioner a 120 month (10 year) upward departure based upon "poor candiate for supervised release." A factor taken into account by the 60 month guidelines. members of this court have admitted that there is no principled way to apply Booker and Booker was disasterous. while it is true that Booker is a matter of Stare decisis. there are exceptions to Stare decisis and Im certain liberty is one of them. Thank you.

## Conclusion

This case is of significant importance and for that reason petition for rehearing should be granted to reconsider whether certiorari should be granted. This court abandoned the mandatory language approach and Utah's indeterminate sentencing system creates a liberty interest calling Booker into question

Dated this: 23rd day of March 2010

Robert D. Straley

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In the Supreme court of the united States

| | |
|---|---|
| Robert D. Straley<br>petitioner<br><br>vs.<br><br>Utah Bd. of pardons et, al<br>Respondents | certificate of counsel pro se<br><br>case no; 09-768 |

I do hereby certify that I am representing myself in this matter and that the petition for rehearing is made in Good faith.

Dated this 23rd day of march 2010

Robert D. Straley
Robert D. Straley